the decision is wrong, for the English theory is that a chose in action is situated at the debtor's residence for purposes of probate duty; so the right against the surviving partner in England is an English asset. *In re Smyth*, [1898] 1 Ch. 89. But by the mercantile view the partnership assets are owned by the firm as an entity. *Hopkins* v. *Baker Bros. & Co.*, 78 Md. 363; *Pratt* v. *McGuinness*, 173 Mass. 170. The right of action is against this entity which is a New South Wales firm, as its business is in that country. *Laidlay* v. *Lord Advocate*, 15 App. Cas. 468. Hence the decision that the right is a New South Wales asset is in line with the modern authorities which, while not openly and courageously adopting the mercantile theory, reach results that can be justified on no other basis. See 57 Cent. L. J. 343; 17 HARV. L. REV. 207.

PARTY WALLS — COMPENSATION FOR USE IN THE ABSENCE OF AGREEMENT. — On enlarging his store, an owner of land built the exterior wall half on his own and half on the adjoining lot, without permission or agreement to divide the expense. Both lots were sold, and the vendee of the adjoining owner in building made use of that part of the wall which was on his land. *Held*, that the vendee of the builder of the wall can recover the value of the use made of the wall. *Spaulding* v. *Grundy*, 104 S. W. 293 (Ky.).

On facts similar to these, the builder of the wall has uniformly been denied the right to proportionate contribution to the cost of erection from the adjoining owner or his grantee, who makes use of the wall. *Preiss* v. *Parker*, 67 Ala. 500; *List* v. *Hornbrook*, 2 W. Va. 340. Recovery limited to the value of the use actually made has been sanctioned in only one case. See *Sanders* v. *Martin*, 2 Lea (Tenn.) 213; *contra*, *Sherred* v. *Cisco*, 4 Sandf. (N. Y.) 480. Whether the recovery be measured by the builder's outlay or by the value of the use of that which the adjoining owner never authorized to be put on his land, the latter is arbitrarily forced to pay for using part of his own land, in the alternative of suffering a diminution in its size or of adopting his remedy of self-help, which would cause needlessly great injury. *Wigford* v. *Gill*, Cro. Eliz. 269; see *Sherred* v. *Cisco*, *supra*, 489. Moreover, the builder of the wall is amply protected by estoppel, if it appear that he was reasonable in assuming a promise by the adjoining owner to pay if he used the wall. *Day* v. *Caton*, 119 Mass. 513. In the case discussed there appears to be no basis for such an assumption; consequently the result seems unwarranted.

POWERS—DEFECTIVE APPOINTMENT—WHEN EQUITY WILL REAPPOINT. — The testatrix bequeathed property to her husband to appoint "$4,000 to my mother's family and the balance to my father's family in such manner as he thinks proper." The donee of the power appointed $4,500 to the mother's family. *Held*, that the appointment is void and that the court cannot appoint the property. *In re Roger's Estate*, 67 Atl. 762 (Pa.).

Where the donee of the power is not required to exercise it, equity will make no appointment. See *Brown* v. *Higgs*, 8 Ves. Jr. 561. But in the present case it seems clear that no discretion was given. The court, while recognizing that the property is held in trust, calls it a trust for the donor. This seems erroneous, as the trust should be for the beneficiaries. See *Brown* v. *Higgs*, *supra*. Where the power is to be exercised for a definite class with no power of exclusion, and members of that class are excluded, equity distributes equally to the entire class. *Kemp* v. *Kemp*, 5 Ves. Jr. 849. Moreover, it is held that where the power is to be exercised for "relations" with power of exclusion, all the "relations" are *cestuis*, and, on a failure to exercise the power, the next of kin will take. *Harding* v. *Glyn*, 1 Atk. 469. Where there has been an attempt to appoint too much, as in the present case, it has been held that the last appointees lose their share. *Trollope* v. *Routlege*, 1 De G. & Sm. 662. This last decision was based on the intention of the donee. In the present case, however, since no preference seems intended, a *pro rata* distribution among the appointees seems desirable on the analogy of the abatement of legacies.

SALES — SALE OF GOODS ACT — EFFECT OF TENDER OF PAYMENT ON VERBAL AGREEMENT. — The plaintiff orally agreed to purchase goods exceed-

ing £10 in value and mailed the checks in payment in accordance with the terms of the agreement. The defendants returned the checks and refused to deliver the goods. *Held*, that there is no payment sufficient to render the contract enforceable under the Sale of Goods Act. *Davis* v. *Phillips, Mills & Co.*, 24 T. L. R. 4 (Eng., K. B. D., Oct. 15, 1907).

Payment by check on funds in a bank is sufficient to come within the similar requirement in § 17 of the statute of frauds. *Hunter* v. *Wetsell*, 84 N. Y. 549. But on the point of mere tender of payment, for the first time litigated in England, the court follows the settled American rule, that the seller may decline a tender, though made strictly according to the terms of the agreement, and that an acceptance of payment is necessary to take a verbal agreement out of the statute. *Hershey Lumber Co.* v. *St. Paul Sash Co*, 66 Minn. 449; *Edgerton* v. *Hodge*, 41 Vt. 676. It is contended that the Post Office was the authorized agent of the parties to accept payment. But the object of the statute was to require something to pass between the parties other than mere words, some act which would be strong evidence of their actual agreement. Such acceptance by the Post Office would occur in the absence of any agreement; consequently it has no force as evidence of an agreement, and is insufficient to render such an oral contract enforceable under the Act.

STATUTES — INTERPRETATION — EFFECT OF SPECIAL SAVING CLAUSE ON GENERAL SAVING STATUTE. — The defendant was indicted and convicted of paying rebates in violation of the first section of the Elkins Act, which had been superseded by the Hepburn Act. The offenses were committed prior to the enactment of the latter. The Hepburn Act expressly repeals all statutes or parts of statutes in conflict with its provisions. It contains an express saving clause mentioning only pending causes, but § 13 of the United States Revised Statutes provides that "the repeal of any statute shall not have the effect to release any penalty incurred under such statute unless the repealing act shall so expressly provide." *Held*, that the conviction is valid. *Great Northern Ry.* v. *United States*, 155 Fed. 945 (C. C. A., Eighth Circ.).

For a discussion of a previous decision reaching the same result, see 20 HARV. L. REV. 502.

TITLE OWNERSHIP AND POSSESSION — POSSESSION OF CONTENTS OF RECEPTACLE. — After seizure of his goods under a writ of *fieri facias* the judgment debtor, without the knowledge of the sheriff, placed a sum of money in a piece of the furniture seized. Shortly afterwards he died insolvent. The sheriff having exercised no control over the money, the official receiver claimed it for the estate. *Held*, that the receiver is entitled to the money. *Johnson* v. *Pickering*, 24 T. L. R. 1 (Eng., Ct. App., Oct. 14, 1907).

For a discussion of this case in the lower court, see 21 HARV. L. REV. 64.

TRUSTS — POWERS OF TRUSTEES — TRUSTEE'S RIGHT TO LEASE TRUST PROPERTY. — Trustees with express power to lease made a 99 year lease of trust property consisting of city lots. It was estimated that the lease would extend 28 years beyond the duration of the trust estate. By the terms of the agreement it was to be binding only after judicial sanction. *Held*, that in the absence of necessity therefor, the term is unreasonable, and judicial sanction will be refused. *In re Hubbell Trust*, 113 N. W. 512 (Ia.). See NOTES, p. 211.

WATERS AND WATERCOURSES — OWNERSHIP OF BED — POSITION OF STATE BOUNDARY LINE AFTER AVULSION. — The Mississippi River, which marked the boundary between Tennessee and Arkansas, in 1876 suddenly left its old channel and made a new cut-off across a neck of land. *Held*, that the boundary is not changed and the state owns the old bed to the line equidistant from the established banks. *State* v. *Muncie Pulp Co.*, 104 S. W. 437 (Tenn.).

By common law the soil of a river is *primâ facie* in the Crown as far as the tide ebbs and flows. *Malcomson* v. *O'Dea*, 10 H. L. Cas. 591. But western states have in general followed the civil law in making the state's title to a river-